No. 4040

IN THE 13

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT

T. M. CALDWELL,
Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ABSTRACT, SPECIFICATION OF ERRORS AND BRIEF FOR THE APPELLANT.

THOMAS ARMSTRONG, JR.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Appellant.

ARMSTRONG, LEWIS & KRAMER,
National Bank of Arizona Building,
Phoenix, Arizona.

BOWER CO., PHOENIX

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Appellees.

ABSTRACT AND STATEMENT OF THE CASE.

On May 27, 1923, T. M. Caldwell filed his Seeond Amended Complaint against the defendants, in which it was alleged, among other things:

> "That on and prior to the 16th day of October, 1919, and at all times subsequent thereto up to and including the date of the filing of the original com-

plaint in this cause, the defendants Edwin R. Post. Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina V. Steinfeld, were owners and in possession of the following described canals and water ditches, sometimes known as the Valley Farms Water Company project or system, and also known as the Santa Cruz Valley Farms project, and Post project, situated in the County of Pima, State of Arizona, and described as beginning approximately nine miles northwest of Tucson, County and State aforesaid, and running thence west along the Southern Pacific Railroad to the Pinal County line, including all of its rights of way, bed and banks and lands used in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plant supplying and intending to supply the said canals and water ditches with water, and to be used therewith for the irrigation of lands owned by the defendants and in their possession known as the Post project, also Valley Farms Water Company project, and also as Santa Cruz Valley Farms project, the same constituting an entire connected and related system of irrigation for said lands. That the said Edwin R. Post on and prior to the 16th of October, 1919, and at all times subsequent thereto, and until the filing of the original complaint herein, had charge or control of the construction of said canals, water ditches, flumes, culverts, gates, dams, wells, pumps and pumping plants, with the knowledge and consent of the other defendants named in this paragraph.'' (Par. II, Second Amended Bill of Complaint, Tr. p. 3-4.)

That on the 16th day of October, 1919, plaintiff entered into a written contract with the defendant Edwin

R. Post, acting for himself individually and as agent for the defendants Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina Steinfeld, for the furnishing of the labor of certain horses and mules and of certain machinery, fixtures and tools to be used in the construction of the canals, water ditches and other works and structures, more particularly described in Paragraph II of the Second Amended Complaint above quoted.

The written agreement is set out at length in Paragraph III of the Second Amended Complaint, and provided for the furnishing of the following described personal property, at the price therein agreed upon:

24 or more teams of mules and harness therefor, at $30.00 per mo. per team;

12 or more Fresno scrapers at $7.50 per mo. per scraper;

2 or more plows at $7.50 per mo. per plow;

4 or more 2-horse Fresno scrapers at $7.50 per mo. per scraper;

6 or more 12x14 feet tents at $5.00 per mo. per tent;

Mess equipment for 30 or more men at $1.00 per mo. per man;

4 or more wagons at $12.50 per mo. per wagon;

Necessary blacksmith equipment at $20.00 per month.

The original agreement did not provide any specific time during which the livestock, tools and equipment should be available for use by Post; and on April 1,

1920, a supplemental contract was entered into between the plaintiff and Edwin R. Post, whereby it was agreed that the latter should have the use of said livestock, tools and equipment under the terms of the original contract until the first day of June, 1920, and for such longer period as may be necessary to complete that portion of the construction work on the Santa Cruz Valley Farms tract.

It is further alleged that under and by virtue of said written agreements of October 16, 1919, and April 1, 1920, the plaintiff furnished for use and there was used by the said Edwin R. Post in and upon the construction of canals and water ditches hereinbefore described the labor of horses and mules, and machinery, fixtures and tools mentioned in said contracts, up to and including the 19th day of June, 1920, of the reasonable as well as agreed value of $9,692.55, of which amount $4,341.50 has been paid, leaving a balance due, after deducting all just claims and offsets, of $5,351.05. Then follows allegations of the filing in the office of the Recorder of Pima County, Arizona, and the serving of the necessary statements for the purpose of fixing a lien under the Arizona statutes. It is further alleged that the Fidelity Savings & Loan Association and Pima Farms Company, defendants, assert some claim, title or interest in and to said canals and water ditches, etc., but that any claim they may have is subject and subordinate to plaintiff's lien.

Complaint prays for the following relief:

"(1) That he be adjudged to have a lien on said canals and water ditches, includingg all of its rights of way, bed and banks, and land used in connection

therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, for the sum of Five Thousand Three Hundred Fifty-one and 5/100 Dollars ($5,351.05), together with interest thereon from the 5th day of August, 1920, prior to all other liens, claims and demands thereon of the defendants, or any person claiming by, through or under them or either of them;

"(2) That the defendants and each of them, and all persons claiming by, through or under them, or either of them, be foreclosed of all equity of redemption or other interest in said property;

"(3) That the interests of the defendants and each of them in said property be sold as provided by law, and that from the proceeds of such sale the plaintiff be paid the amount of his lien aforesaid, and interest thereon from the 5th day of August, 1920, together with the expenses of sale and costs of this action;

"(4) That the plaintiff have judgment against the defendants, Edwin R. Post, Valley Farms Water Company, and Mose Drachman, as receiver aforesaid, for any deficiency that may remain due him on such sale;

"(5) That plaintiff have such further judgment, decree or order as to the Court may seem meet."

The defendants Albert Steinfeld, Bettina Steinfeld, Pima Farms Company, and Fidelity Savings & Loan

Association, having theretofore filed their motions to dismiss plaintiff's amended complaint, upon the ground that it did not state facts sufficint to constitute a cause of action against said defendants or any one of them, and said motions having been sustained for the reasons set forth in the opinion, (pages 20-23, Transcript of Record) it was on May 7, 1922, upon plaintiff being given leave to file his second amended complaint, stipulated in open Court, by the solicitors for plaintiff and the last above named defendants, that said defendants' motion to dismiss the amended complaint might be considered as having been refiled as to the second amended complaint; and thereupon said motions were submitted and sustained as to the second amended complaint. Plaintiff declined to plead further, and decree dismissing second amended complaint as against said defendants was rendered.

On May 12, 1923, plaintiff, after having filed assignments of error on appeal, presented same together with his petition for appeal, which said petition was forthwith granted, and appeal bond fixed at $300.00. Bond was duly given and approved,citation on appeal issued and served, praecipe for transcript of record served and filed.

Thereafter, on the 28th day of May, 1923, transcript of record was filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Plaintiff's assignments of error are as follows:

> "The plaintiff says that the decree rendered in the above-entitled cause on May 7th, 1923, dismissing his bill of complaint as against the defendants Albert

Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, is erroneous, and against his just rights, for the following reasons:

"(1) That under the facts alleged in his second amended bill of complaint and the law of the State of Arizona, he is entitled to the relief prayed for in his second amended complaint against said defendants and each of them.

"(2) Because the Court erred in sustaining the motions of the defendants Albert Steinfeld, and Bettina Steinfeld, his wife, to dismiss the plaintiff's second amended complaint.

"(3) Because the Court erred in sustaining the motion of the defendant Fidelity Savings & Loan Association to dismiss the plaintiff's second amended complaint.

"(4) Because the Court erred in sustaining the motion of the defendant Pima Farms Company to dismiss the plaintiff's second amended complaint.

"(5) Because, under the facts alleged in the plaintiff's second amended complaint, and the law of the State of Arizona, the plaintiff is entitled to a lien upon the ditches, canals and improvements described in the plaintiff's second amended complaint for the payment of the amount alleged to be due him on account of the labor of horses, machinery, tools and fixtures furnished by the plaintiff to be used in the construction of the canals and water ditches and other works and structures mentioned in the second

amended complaint, under the terms of the contracts set out in the second amended complaint."

BRIEF AND ARGUMENT.

Only one question, and that one of law, is presented by this appeal, viz:

Whether, under the provisions of Sections 3639 et seq., Revised Statutes of Arizona, 1913, Civil Code, the plaintiff is entitled to a lien for the reasonable and agreed value of horses, fixtures or tools rented directly to a joint owner of the premises for the purpose of being used in the construction of improvements or structures thereon.

Section 3039, supra, is as follows:

> "Every person, firm or corporation who may labor or furnish materials, machinery, fixtures or tools to be used in the construction, alteration, erection, repair or completion of any building or other structure or improvement whatever shall have a lien on such house, building, structure or improvements for the work or labor done or materials, machinery, fixtures or tools furnished, whether said work was done or articles furnished at the instance of the owner of the building, or improvement, or his agent. The lien herein provided shall extend to the lot or lots of land necessarily connected with the building, structure or improvement made or erected; and every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration, or repair, either in whole or in part, of any building or other structure or improvement, shall be held to be the agent of the owner for the purposes of this chapter, and the

owner shall be liable, under the terms hereof, for the reasonable value of labor or materials furnished to an agent.''

In the case of Mendoza et al. v. Central Forest Co., decided by the California District Court of Appeals on May 17, 1918, and rehearing denied by the Supreme Court on July 15, 1918, (174 Pac. 359) it was held as follows:

''Farm development, consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity, designed to convey water to and distribute it over the land, and constituting a permanent improveemnt to the land, increasing its value, is a 'structure,' within Code Civ. Proc. Sec 1183, providing for mechanic's lien on specified improvements 'or other structures'.''

The lower court in its written opinion filed at the time it sustained the motion to dismiss the amended complaint, used the following language:

''Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party who stands in the place of the owner by reason of his contract of hiring. McMullin vs. McMullin, 42 Atl. 500; Richardson vs. Hoxie, 38 Atl. 142; Edwards vs. Lumber Co., 84 N. W. 150; Mabie vs. Sines, 52 N. W. 1007; McKinnon vs. Lumber Co.,

138 N. W. 781; Lohman vs. Peterson, 58 N. W. 407; McAuliffe vs. Jorgenson, 82 N. W. 706, and Potter Co. vs. Myer, 86 N. E. 383.

From the foregoing it is impossible to tell what the ruling of the Court would have been had the lien been claimed on a contract entered into between plaintiff and all the owners of the realty instead of just one owner. The second amended complaint, in the opinion of counsel by who it was drafted, met the objection to the amended complaint pointed out by the Court in its opinion as follows:

> "It is averred that the defendants, other than Pima Farms Company and Fidelity Savings and Loan Association, are the owners and in possession of the property, but there is no averment as to who owned the property at the time the contract sued upon was entered into, or the work alleged was done."

While the Court did not file a written opinion at the time it sustained the motions to dismiss the second amended complaint, it stated from the bench that the second amended complaint was defective in the same respect as the amended complaint, the Court evidently taking the view that one owner in possession of property and in charge of the construction of improvements and structures thereon, with the knowledge and consent of the other owners, cannot make a contract for the hiring of teams, machinery, tools and fixtures to be used in the construction of such structures and improvements which will entitle the person furnishing the same to a lien under the provisions of the Arizona statute.

In *Wood, Curtis & Co. vs. El Dorado Lumber Co. et al.,* 94 Pac., page 877-878, decided by the Supreme Court of California in 1908, the plaintiff had hired for a stipulated price a number of horses to a contractor engaged in the building of a railroad for the defendant, and sought to fix upon the railroad a lien for the amount due from the contractor for hire of the horses. Under the California statute as it then existed, no lien was given for the furnishing of "machinery, fixtures, or tools" to be used in the construction, etc., of any improvement or structure, and the lien was therefore denied. However, in that case the Court gives a very good definition of the essential meaning of "horses, etc., so furnished," which is as follows:

> "The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers, or by traction engines and steam paddies. One and all are in their essence but tools and machinery."
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> *Wood, Curtis & Co. v. El Dorado Lumber Co. et al.,* 94 Pac. 877-878.

From the language of the opinion above quoted, it is quite evident that had the California statute under consideration given a lien for "Machinery, fixtures or

tools'' as does the Arizona statute under which plaintiff claims his lien, the Court would have held that the plaintiff in the *Wood, Curtis & Company vs. El Dorado Lumber Co.* case was entitled to a lien upon the railroad for the reasonable value for use of horses and harness furnished the contractor to be used in its construction.

> ''This action is brought to enforce the statutory lien, provided by Chapter 95, Laws 1877, upon the logs of the appellants, for the labor and services of the respondent, by his teams and servants, in putting them into the Chippewa river. It is in proof that the respondent himself, personally and manually, did but little of such work, and that it was done mainly by his teams and servants; and it is contended that for such services by others in the work, and in using the teams, although by the employment and for the use of the respondent, the statute does not confer a lien upon the logs for his benefit.
>
> ''This cannot be the construction of our statute, whatever may be the construction of similar statutes of other states, of different language, as in Maine, where the statute expressly limits the lien to *personal* services. There is in our statute no such restrictive words, and the language, 'labor and services,' should be construed as broadly as its common use will warrant, which would include such labor and services, when performed by servants and agents, as well as personally, as in the common count in *assumpsit,* for work and labor. The lien being given as well to any 'company or corporation,' must necassarily include labor and services not personally and manually performed. That the labor in this case was performed for the contractor with the owners of the logs, or his sub-contractor, is no ob-

jection to the lien claimed. Munger v. Lenroot, 32 Wis. 541."

Hogan vs. O'Neill et al., 5 N. W. 494-495.

In *Chicago & N. E. R. vs. Sturgis,* 7 N. W. 213, it was held that the owner of horses was entitled to a lien for the reasonable value of services performed by them under contract of hiring, the court saying:

"The law limits its protection to the one who labors, and does not extend it to the one who merely hires out the labor of others. But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute. No right arises to any one out of its service except to him. Persons in his employment have distinct rights of their own."

In *Perry et al. v. Murphy et al.,* 57 N. W. 792, the Supreme Court of Minnesota held that one who lets his teams and teamsters to a sub-contractor to do work in constructing a railway is entitled to a lien, and in so holding, said:

"The defendant contends that Ballard was not entitled to a lien, because his claim was neither as a contractor (or sub-contractor) or for skilled workmen or a material man or laborer.

"The case comes under laws 1889, c. 200, sec. 3, which reads: 'Whoever performs labor, or furnishes skill, material or machinery for the construction, alteration or repair of any line of railway,' etc., 'shall have a lien to secure the contract price, or value of the same, upon such line of railway, tele-

graph line, depot, bridge, fence, or other structure appertaining to such line of railway,' etc., 'and upon all franchises, privileges and immunities, and all rights of way of or appertaining to any of the several lines aforesaid.' The purpose of the statute is to give a lien to any one who contributes labor, skill, or material in constructing, altering, or repairing a railway, pursuant to and in performance of a contract which the owner has made. And whether one who, instead of undertaking part of the work at a gross price, and doing it through his servants, does it through the same servants, to be paid what it may be worth, is to be deemed a subcontractor, within the meaning of the act, or not, we do not see why he does not perform labor, within its meaning. It would be a very narrow construction to hold that he must perform the labor in person, and that performing it through his servants or teams is not included in the act. If one puts in a hundred days of his servants' work, he contributes to performance of the contract which the owner has made to the same extent as by putting in a hundred days of his personal labor, and he comes equally within the spirit of the act. And it does not matter how many removes he may be from the owner, provided the work be such as the owner contracted for, and he connects himself by mesne contracts with that of the owner.''

Perry et al. v. Murphy et al., 57 N. W. 792-793.

''The action is founded upon Section 6266, Lord's Oregon Laws, which provides as follows:

'' 'Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction

of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptlp make payments to all persons supplying him or them with labor or materials for any prosecution of the work provided for in such contracts,' etc.

"The statute was enacted in 1903, and is entitled:

" 'An act to protect subcontractors, materialmen, and laborers furnishing material for doing work upon bublic buildings, structures, superstructures, or other public works.' Laws 1903, p. 256.

"(1) Under the rule of construction, this statute should be read in and become a part of the bond.

"In the case of Multnomah County v. United States Fidelity & Guarnty Co., 87 Or. 198, 170 Pac. 525, L. R. A. 1918C, 685, an action was brought by the county against the defendant, for and on behalf of L. H. McMahan, against the same defendants here for the use of a caterpillar engine which it is alleged that McMahan hired to Sweeney and for the use of which he agreed to pay $10 per day. There, as here, a general demurrer was filed to the complaint and sustained by the trial court upon the theory that the use of the caterpillar engine did not come within the terms of the bond. That ruling was reversed by a decision of this court, written on January 22, 1918, by Mr. Justice Bean.

"(2) The law of that case is vigorously attacked by respondent; but it has been in force and effect for more than one year, and it is a matter of common knowledge that in the ordinary course of business many such bonds have been written in that time, and the decision must have been known and

acted upon at the time of their execution, and that case should now be *stare decisis.*

"The purpose of the act was to protect all persons supplying 'labor or materials for any prosecution of the work provided for in such contract,' and there is much stronger reason for holding that the use of horses comes within the meaning of the word 'labor' as used in the act, than the rental of a caterpillar engine employed on the work. A caterpillar engine' is a machine; a 'horse' is a domestic animal with some degree of intelligence.

"The respondents have cited definitions from Words and Phrases and the New Standard Dictionary as to the meaning of the words 'labor and material' and of the word 'labor,' but Century Dictionary defines the word 'labor' as 'work done by a human being or an animal,' and Words and Phrases, vol. 5, p. 3951, says:

" 'Within the meaning of a statute giving a lien to 'laborers and for persons furnishing materials to contractors or subcontractors,' labor done by a man's team may be fairly regarded as labor done by him, no right arising to any one out of its services except to him'—citing Chicago N. E. R. Co. v. Sturgis, 44 Mich. 538, 541, 7 N. W. 213, 214.

"The opinion in that case says: 'But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute.'

"The same authority also cites the case of Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490, 491, in which the syllabus says: 'The 'labor and services' for which chapter 95 of 1877 gives a lien upon logs are not merely the personal or manual labor and services of the claimant, but include those performed by his teams and servants.'

"(3) If O'Neil in person or through his own employes had used his horses in the 'prosecution of the work,' there would be no question about his right to recover for the joint services of both horses and men. On legal principle, the same rule should apply where he hired out his horses to another to be used and they were so used. We hold that the word 'labor,' within the meaning of the act, should be construed to include the services which the horses performed in the 'prosecution of the work.'

"Judgment is reversed."

Multnomah County v. United States Fidelity & Guaranty Co. et al., 180 Pac. 104-105.

"The claims of Riegelsperger, Joseph Gibson Company, First National Bank of Deer River, Engstrom & Hosford, and Ord Company involve the question of whether one renting or furnishing to the original contractors horses for use in performing the contract may have the benefit of the bond. This question is by no means free from difficulty. McKinnon v. Red River Lbr. Co., 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, involved the question whether the labor of teams, hired without drivers, was 'manual labor or other personal services,' so as to come within the log lien law. The decision that there was no lien is not controlling in this case, as the statute and bond use language that is much broader, 'all work and labor performed and all skill, tools, machinery or material furnished.' In Miller v. American Bonding Co. 133 Minn. 336, 158 N. W. 432, we held that there was a liability on the contractor's bond for the repair of tools and machinery necessarily used on the work and for the reasonable value of the use of such tools and machinery. It

may seem doubtful if horses can reasonably called 'tools' or 'machinery,' but, on the other hand, it is impossible to see why the surety should be liable for the repair and use of dinky engines or dump cars used in road construction, and not be liable for the use of teams which do the same work. The horses certainly perform work for the completion of the contract just as the engines and cars do. We have examined the authorities cited by appellant, and are of the opinion that they do not compel us to hold that there is no liability for the use or rental of teams without drivers. All of the cases cited are decided under statutes that are materially different from ours, and are not in accord with our decision in the Miller case. Reference may be made to the notes in 16 L. R. A. (N. S.) 585, 43 L. R. A. (N. S.) 162, and L. R. A. 1915F, 951, where many cases are cited and discussed, also to Eastern Texas R. R. Co. v. Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030, St. L., I. M. & So. Ry. Co. v. Love, 74 Ark. 528, 86 S. W. 395, and Texas & St. L. R. R. Co. v. Allen, 1 White & W. Civ. Cas. Ct. App. Sec. 568.

"Our conclusion, based upon the language of the statute and of the bond, is that the surety is liable for the rental value of horses necessarily used on the work, though the claims did not include the services of teamsters. This would necessarily cover the rental value and cost of repair of harnesses."

Dawson v. Northwestern Const. Co. et al., 163 N. W. 772-777.

The cases cited by the District Court as authority for the proposition that no lien existed in favor of a person furnishing horses, tools, machinery and equipment to any person other than the owner of the land

upon which the structure or improvement is being constructed, have practically no bearing upon the case at bar, for the reason that the statutes under consideration in those cases were more restricted in their scope and application than the Arizona statute under which appellant claims his lien.

Nor are we able to follow the Court in its reasoning that, while a lien might have existed had the contract been made directly with all the owners of the property upon which lien is claimed, such is not the case where contract is made with one of the owners, who had charge or control of the construction of the structure or improvement, with the knowledge and consent of the other owners, and who in making such contract acted for himself individually and as agent for the other owners.

Section 3639, Revised Statutes of Arizona, above quoted, expressly provides that the "person having charge or control of the construction * * * * of any building or other structure or improvement shall be held to be the agent of the owner for the purpose of this chapter." This does not create a general agency by which the owner is personally bound to pay the contract price for labor, machinery, fixtures or tools furnished the contractor to be used in the construction, but does constitute the person in charge or control of the construction the agent of the owner for the purpose of fixing a lien upon the structure or improvement being made. The lien exists, in the language of the statute, "whether said work was done or the articles furnished at the instance of the owner of the building or improvement or his agent" (the person having charge or control of the construction).

The articles of personal property other than horses furnished by the appellant in this case, under his contract, are clearly tools, machinery or fixtures; while the horses furnished under the contract to be used for the purposes set forth in the second amended complaint, in decisions above cited and quoted from, have been held to be tools or machinery within the meaning of a statute giving a lien for tools or machinery used in construction of structures or improvements, and the work performed by them has been held to be "labor" within the meaning of lien statutes.

Had the appellant in this case entered into a contract with the owner or with the person in charge and control of the construction for the excavation of the canals and ditches upon which his horses, tools and machinery were in fact employed, at so much per yard, his right to a lien would have been clear; and the Court should not permit itself to be confused by reason of a contract providing a different basis for payment to the appellant for the reasonable value of the services of his horses and the use of his machinery, tools and equipment. Whatever the form of the contract, the fact remains that the appellant in this case contributed to the construction of structures and improveemnts for which he has not been paid and which have inured to the benefit of the owners thereof. All lien statutes recognize and are enacted for the purpose of enforcing the equitable doctrine that one person should not reap where another has sown.

We respectfully urge that the case should be reversed and remanded with instructions to the District

Court to vacate and set aside decree dismissing second amended complaint as to the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, and Pima Farms Company, and to overrule their motions to dismiss.

Respectfully submitted,

THOMAS ARMSTRONG, JR.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Appellant.